

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 14 of 2007

In

S.C.Suit No.341 of 1999

Hotel Bandra International Pvt. Ltd.. Appellant

(Orig.Plff)

V/s

Gundecha Builders and Ors. .. Respondents

(Orig.Defts)

Shri Niranjan Vaghela i/b Pandya and Co. for Appellant

Ms Swati Gharat for Respondent no.1

Shri Vidyashankar Yadav for Respondent nos.2,4,11,13

and 14

CORAM:S.R.SATHE, J.

DATED:17th Aug. 2007

ORAL JUDGMENT :-

1. The Appellant original plaintiff in S.C.Suit No.341 of 1999 have preferred this appeal against the order passed by the City Civil Court, Bombay whereby suit was decided on preliminary issues and plaint was rejected Under Order-7 Rule-11(d) of the Code of Civil Procedure.

For the sake of convenience hereafter the parties shall be referred to as the plaintiffs and defendants.

2. Brief facts giving rise to this appeal are as under:-

. The defendant no.1 is a builder promoter of the property situated at Survey NO.A 621 and A 624 wherein he has constructed a building known as Merchant Chambers, Guru Vidya Building, Bandra. In fact previously there were tenants in the said property and after demolition of the old building the defendant no.1 constructed new building and defendant nos. 3 to 17 were allotted shop premises in the same. The plaintiff company agreed by virtue of agreement dated 11-7-1981 to purchase 1st to 6th floors of the said building for their hotel business. According to the plaintiffs they also purchased the terrace on the first and 6th floors and above 6th floor. So, also shop no.8 admeasuring 800 sq.ft. situated on the ground floor which is alternatively described as passage or lobby. The access to the stair case is from the said lobby was also purchased by plaintiffs. As plaintiffs purchased 1st to 6th floors the other members of the defendant no.2 society were not having any right to use the stair case or the lobby. According to the plaintiffs the defendant no.2 society is in management and administration of the said building for the purpose of collection of taxes and

maintenance charges and outgoings. However, the defendant no.2 society had no right in the property and no conveyance deed was executed in favour of the defendant no.2 society. According to the plaintiffs the other shop owners had purchased their respective shops from the building but they had no right in respect of terrace, lobby and the stair case. Members of the defendant no.2 society viz. defendant nos.3 to 17 who are in occupation of the various shops in the said building started laying on claim over the terrace, stair case, lobby and chajjas. Plaintiffs filed the present suit for a declaration that the agreement executed between plaintiffs and defendant no.1 is subsisting and the same is binding on the defendant no.1. Plaintiffs also prayed for permanent injunction restraining defendant nos.2 to 20 from obstructing the plaintiffs from making exclusive use of shop no.8 which is known as lobby or passage as well as the terraces situated on the 1st and 6th floors and above 6th floor. Plaintiffs also prayed for mandatory injunction directing the defendant nos.2 to 20 to remove their air conditioners, sign boards, and other articles installed on the terrace of the first floor of the suit building.

3. The defendant nos.2 to 17 opposed the plaintiff's suit. They firstly contended that plaintiffs are not the exclusive owners of the shop no.8 which is called as lobby or passage. Nor the terraces are owned by the

plaintiffs and that other members of the defendant no.2 society are also having right to use the terrace and other common places in the said building. They also contended that the plaintiff is also a member of the defendant no.2 society which is registered long back in the year 1990 and even according to the plaintiffs pleadings the dispute is in between the members of the co operative housing society and as such the civil court has no jurisdiction to try the said suit. The defendants also contended that the plaintiffs had not issued notice under Section 164 of Maharashtra Co-operative Societies Act (hereafter called MCS Act) and as such the suit is not tenable.

4. Admittedly, the trial court heard the arguments of both sides on the preliminary issue regarding jurisdiction and maintainability of the suit. The trial Court came to the conclusion that the dispute between the plaintiffs and defendants is touching the business of the co operative society and as such as per the provisions of Section 91 of M.C.S. Act the civil court has in fact no jurisdiction to try the said suit. He also held that suit is bad for want of notice under Section 164 of M.C.S. Act and therefore passed the order regarding rejection of the plaint.

5. Being aggrieved by the said order the plaintiffs have filed the present A.O..

6. In this appeal, the Respondents original defendants took preliminary objection regarding maintainable of the appeal. It was decided that the said point will be considered along with the other issues and accordingly the AO was heard finally at the admission stage.

7. In this appeal before me, Mr.Vaghelga, learned Advocate for the plaintiff has urged 3 points. Firstly, he submitted that though the learned trial Judge has rejected the plaint as per provisions of Order 7 Rule 11(1d) of Code of Civil Procedure. In the first part of the final order the learned trial Judge has held that a civil court has no jurisdiction so according to learned advocate for the appellant under the circumstances the Court should have only returned the plaint for presentation to the proper court. So, according to him the present order is a composite order and as such appeal from order is maintainable because such AO lies against the order passed under Order 7 Rule 10 of Code of Civil Procedure regarding return of the plaint. Secondly, he canvassed before me that in the instant case it is clear from the agreement between the plaintiffs and builder i.e. defendant no.1 that plaintiff company is having exclusive rights in respect of 1st to 6th floors and the terrace on 1st and 6th and above 6th floor. They are having exclusive right to use the stair case for the said floors and the said stair

case goes through the passage in question which is exclusively sold to plaintiff. He, therefore, submitted that as defendants are not concerned with the said property and plaintiffs are claiming right, title and interest in respect of the suit property, the dispute between the parties is not covered by Sec. 91 of M.C.S. Act and as such civil court has jurisdiction to try the present suit. Lastly, he submitted that as plaintiffs are the owners of the terraces, passage and chajjas plaintiffs are entitled to get injunction as prayed and if the same is not granted they would suffer irreparable loss. He, therefore, submitted that order passed by the learned Judge, City Civil Court, Bombay is illegal and the same be set aside and interim injunction be granted against the defendant nos. 2 to 17.

8. As against this the learned Senior Advocate Shri Dhakephalkar, submitted that order passed by the learned trial Judge is legal and correct. According to him the dispute squarely falls within the purview of Section 91 of MCS Act and Civil court has no jurisdiction to try the said suit. He therefore, submitted that appeal be dismissed.

9. It is not in dispute that the defendant no. 1 is the builder/developer of the suit building. It is also an admitted fact that the defendant nos. 3 to 17 are the purchasers of different units in the said building and

the said units are situated on the ground floor of the said building. There is no dispute on the point that the plaintiff as well as defendants 3 to 20 are members of the defendant no.2 society and defendants.2 society is formed and is concerned with the management and administration of the said society and building in question.

10. Bearing in mind the above admitted position, we have to see as to what is the nature of the present dispute between the plaintiff and defendants nos.2 to 20 and whether it is such which touches the business of the society. It is true that as the sale deed of the property in question has not been executed in favour of the defendant no.2, however, at the same time admittedly the society has been registered and bye laws of the said society are also prepared and the present plaintiff and defendant nos.3 to 20 have accepted the said bye laws and the same are binding on them. From the said bye laws it is clear that the defendant no.2 society is classified as tenants-co partnership housing society and the object of the said society is to obtain conveyance from the promoter, in accordance with the provisions of Ownership Flats Act and Rules made therein of the right, title and interest in the lands with building therein. Admittedly, the society is concern with the management and administration of the suit building. Even the plaintiff has also admitted this position in his plaint.

It is clear that the suit building consists of several units and the said units have been purchased by different persons including plaintiff company and defendants 3 to 20. Only thing is that the plaintiff has purchased most of the units. But that does not mean that the plaintiff has got any extra ordinary rights in respect of the property which was not at all liable to be disposed of by the builder. In other words, the plaintiff cannot lay a claim in respect of portion which was never considered to be a portion capable of being sold. The portion which was to be kept common between all the members of the society and which was shown as common in the original sanctioned map cannot be disposed of by the builder/developer. So, even if any such portion is disposed of or sold to any person by the builder such sale would not bind the society and other members. Such sale would be against the provisions of Flat Ownership Act and Co-op. Societies Act.

Incidentally, it must be noted that several legal proceedings are pending between the parties. Some are initiated by the present plaintiff. It is worth to note that the plaintiff has even mentioned in the plaint that when there was dispute between plaintiff and the defendants with regard to the rights of the defendants members for use of a particular portion of the suit building for laying telephone lines, cable lines,

electricity wiring etc. the plaintiffs filed proceedings in the Co operative Court. So, this itself shows that the plaintiff is in fact aware that then there is a dispute about the enjoyment of common facilities or common portion of the suit building the management of which is to be looked after by the society, the issue has to be taken up before the Co operative Court. So, in the instant case merely because the plaintiff averred in the suit that he is exclusive owner of the particular portion such as terraces, stair case, lobby or passage that would not make the subject matter as one not touching the business of the society.

11. In the present case the main dispute between the plaintiff and defendant nos.2 to 17 is in respect of shop no.8 which is known as lobby or passage wherein stair case is situated. Similarly, there is a dispute between chajjas, terraces and the stair case. Admittedly above 6th floor there is a over head water tank, which is admittedly for the use of the society for all members. It is needless to say that the if the said tank is meant for the society then the approach road or the stair case for the said tank has to be used by the society and its members. No one single individual can lay exclusive right over the said stair case. From the plaint itself it appears that members of the society are contending that they are having a right of access through the passage in question. It may be that the

builder might have sold this passage which is called as shop no.8 to the plaintiff but it appears that the said passage was in fact kept common then naturally the question arises whether the plaintiff can agitate that he is exclusive owner of the said passage and society and its members have absolutely no right to use the said passage. Thus, the present dispute is in fact between the plaintiff who is one of the members of the co operative society and other members of the said co operative society. When both have put forward their claim in respect of a particular portion of the society, then society has to determine as to which member is in fact having a right and if such dispute cannot be resolved by the society or if the same is resolved by the society but both the parties are not satisfied with it then such dispute has to be referred to the Co operative Court. In fact that is contemplated by Section 91 of M.C.S. Act. It would be worthwhile to see what Section 91 says, it runs as follows:-

Section 91 (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, elections of the committee or its officers other than elections of committees of the specified societies including its officer, conduct of general meetings, management or business of a

society shall be referred by any of the parties to the dispute, or by a federal society to which the society is affiliated or by a creditor of the society, to the co operative court if both the parties thereto are one or other of the following "- - -

If we take into consideration the entire dispute involved in the present suit and the above mentioned provisions I have no hesitation to hold that the present dispute between the parties is touching the business of the society

12. There is no doubt that jurisdiction to try and entertain a suit has to be determined on the basis of averments in the plaint and not on the basis of the defence taken by the defendants. Even if we see the averments in the plaint it is quite evident that according to the plaintiffs, plaintiff company as well as the defendant nos.3 to 20 are the members of the defendant no.2 society. Plaintiff company has impleaded the defendant no.2 society in the present suit so taking into consideration the averments in the plaint it is very clear that civil court has in fact no jurisdiction to try the present suit as the present suit is touching business of the society. This dispute ought to have been taken by the plaintiff before the Co operative Court. So, learned trial Judge has rightly held that

the City Civil Court has no jurisdiction to try the present suit.

13. It is true that if point with regard to jurisdiction is decided as a preliminary issue and the court comes to the conclusion that the said court has no jurisdiction to try the said suit then the court should return the plaint as per provisions of order 7 Rule 10 of Code of Civil Procedure. However, it is well settled that a person cannot claim the benefit under this provisions of Order 7 Rule 10 of CPC with respect of the matter which has been taken to a Court the jurisdiction of which has been specifically barred with respect to a matter invoked by a special legislation. As per the provisions of Section 163 of M.C.S. Act when dispute is touching to the business of the society then the same has to be resolved by the Co operative court and jurisdiction of Civil court is specifically barred for such matters. So, considering this aspect the Court is certainly empowered even to dismiss the suit.

14. In the instant case the final order that is passed by the court is not with regard to return of the plaint on the point of not having jurisdiction. The final order is rejection of the plaint. The Point with regard to maintainability of the suit for want of notice under Section 164 of M.C.S. Act was agitated before the trial Court and the trial Court rightly observed that in the

instant case it was necessary to issue notice under Section 164 of MCS Act. So, he held that the suit is not maintainable for want of statutory notice under Section 164 of MCS act and therefore passed the order for rejection of the plaint as per the provisions of order 7 Rule 11 (1d) of Code of Civil Procedure. So, when such was the position, the plaintiff should not have filed A0 against the said order because as per the provisions of Order 43 of CPC no appeal from order lies against the order passed under Order 7 Rule 11 of CPC. So, looking to the present A0 from any angle it is very clear that the present A0 is liable to be dismissed.

15. Hence I pass the following order :

. A.O. is dismissed.

. Under the circumstances of the case parties to bear their own costs.

(S.R.SATHE, J.)